No. 21161

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REDERI A/B NORDSTJERNAN, etc.,
aka JOHNSON LINE,

Appellant,

vs.

CRESCENT WHARF & WAREHOUSE CO.,

Appellee.

UPON APPEAL FROM THE
UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

OPENING BRIEF OF APPELLANT REDERI A/B NORDSTJERNAN

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Statutes

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STATEMENT OF PLEADINGS AND JURISDICTIONAL FACTS

Adolf Bojorquez, a longshoreman, was injured on November 27, 1963, aboard the M.S. ROSARIO, a cargo vessel owned by Rederi A/B Nordstjernan (hereinafter called the shipowner). Bojorquez sought recovery from the shipowner on theories of negligence and unseaworthiness [C.2]. The shipowner denied liability [C.8] and impleaded plaintiff's employer, Crescent Wharf & Warehouse Company (hereafter called the

stevedore company), seeking full indemnity against any liability to Bojorquez [C.16]. The stevedore company denied responsibility [C.26]. Jurisdiction was invoked under the diversity rules [28 U.S.C.A. 1332]. Bojorquez is a citizen of the State of California, and the shipowner is a Swedish corporation [C.2]. Jurisdiction over the Third-Party Complaint concerns a dispute ancillary and incidental to the principal action.

The case was submitted to a jury which returned a verdict of $20,000 for Bojorquez against the shipowner, and denied indemnity. The shipowner appeals from the judgment entered in favor of the stevedore company.

The jurisdiction of this court rests under 28 U.S.C.A. 1291, notice of appeal having been filed within the time provided by 28 U.S.C.A. 2107 [C.35].

STATEMENT OF THE CASE

There is little dispute about the circumstances of this accident. Bojorquez, a longshoreman, was employed by the stevedore company and was assigned by it on November 27, 1963 to assist in the discharge of cargo from #5 starboard lower hold of the M.S. ROSARIO. [Rep. Tr. p. 49, lines 12-16].

The description of #5 lower hold in the following paragraphs will be more meaningful if the exhibit photographs and diagrams are examined. The starboard portion was 44′ long, 29′ wide and ran fore and aft between the vessel's propeller shaft and the starboard skin of the ship. The shaft was enclosed in a housing which protruded into the space along the port side; this housing was about 6′ wide and 7′ high and, being completely

enclosed, resembled a shelf along the port side of the tank. A similar housing along the starboard side enclosed one of the ship's fuel tanks. It, too, formed a shelf. The area between the shelves is called the well. An overhead opening in the hatch was situated at about the fore and aft midpoint, through which cargo could be loaded and discharged.

Rolls of newsprint weighing 1600 pounds apiece were stowed in the after half of the deep tank [Rep. Tr. p. 57, line 18]. These rolls were cylindrically shaped, each approximately 4′ in diameter and 5′ in height [Rep. Tr. p. 52, lines 18-19]. Some rolls were stowed on deck between the shelves in the well [Rep. Tr. p. 52, line 22-24]. On top of these rolls a smooth wooden flooring had been placed [Rep. Tr. p. 52, lines 20-21], the top of that flooring being approximately 2½′ below the shelves that ran along both sides of the space [Rep. Tr. p. 58, lines 3-5]. Other newsprint rolls were stowed on end on top of the well's wooden flooring and the shelves [Rep. Tr. p. 52, lines 10-16 and p. 58, lines 11-21]. All rolls were to be discharged at Los Angeles.

When the M.S. ROSARIO arrived at Los Angeles, the stevedore company undertook to discharge the vessel. Overall supervision was directed by stevedore company's superintendent, Ralph W. Mann, [Rep. Tr. p. 137, lines 13-17]. He was assisted by two other stevedore company supervisory employees, the ship boss Al Geere and the hatch boss Tom A. Hendriksen [Rep. Tr. p. 137, lines 13-24]. The methods of discharging were selected solely by the stevedore company, which did not consult the shipowner about any phase of the operation [Rep. Tr. p. 137, line 25, through p. 139, line 3]. None of the

shipowner's employees were present or participated in any way in the discharge activities [Rep. Tr. p. 119, lines 20-25].

The stevedore company first discharged the rolls standing on end in the well down to the level of the wooden flooring, some 2½′ below the shelves. Then the stevedore company superintendent, ship boss and hatch boss stopped the cargo discharge operation and inspected the remaining rolls [Rep. Tr. p. 138, lines 6-23]. The three men decided, at the conclusion of their conference, to discharge next the rolls stowed on end on the shelves with "frisco pullers" [Rep. Tr. p. 62, lines 8-17]. This device is used to "break" rolls standing on end over onto their rounded sides so that the rolls may be rolled on their round sides forward in the hold to the area directly beneath the hatch opening overhead from which point the ship's winches could hoist the rolls up and out of the hold. A "frisco puller" consists of several fixed hooks which can be clasped against the top of a roll. Several lines 10′ - 12′ long are secured to it and the longshoremen, by pulling on the lines, can cause the heavy roll to topple off its end and over onto its rounded side [Rep. Tr. p. 62, line 18, through p. 63, line 9].

When the stevedore superintendent, Ralph Mann, decided to use "frisco pullers", he intended that the longshoremen would stand on a shelf and break over the rolls onto the same shelf [Rep. Tr. p. 169, line 23, through p. 170, line 5]. He considered this to be the proper and logical method [Rep. Tr. p. 170, lines 13-22]. He did not intend that the men stand in the well beneath the rolls and pull from that position as this would cause the heavy rolls to fall off the shelf and endanger the men standing

in the well. On the basis of his 37 years in the stevedore business, and 20 years as a superintendent, Mr. Mann believed standing and pulling in the well was "dangerous" and he "wouldn't consider" doing it [Rep. Tr. p. 70, line 23 through p. 171, line 4; p. 165, line 19 through p. 166, line 1]. Mr. Mann failed, nevertheless, to instruct the hatch boss, Mr. Hendriksen, and the longshoremen they should not stand in the well [Rep. Tr. p. 163, lines 9-12].

After the stevedore superintendent and ship boss departed from the area, Mr. Hendriksen allowed his longshoremen, including Bojorquez, to do precisely what Mr. Mann had not intended, i.e., to stand in the well beneath the heavy rolls and pull on the lines of the frisco pullers until the roll toppled off the shelf and fell into the well [Rep. Tr. p. 67, line 19, through p. 68, line 2]. Tom Hendriksen told the longshoremen that when a roll started to topple, they should drop their lines and run forward in the well to get away from the falling roll [Rep. Tr. p. 70, lines 10-18]. Bojorquez and his partner, who were assigned to pull on the line at the after or closed end of the hold, were expected to run forward directly beneath the toppling roll, and do so with split second timing between the moment when the roll started to topple off the shelf and the moment it crashed into the well [Rep. Tr. p. 218, lines 18-23]. Tom Hendriksen knew at the time that rolls of newsprint frequently bounce in an unpredictable manner when they fall to the deck [Rep. Tr. p. 212, lines 7-11], and that this further multiplied the danger [Rep. Tr. p. 215, lines 17-20].

Bojorquez and the other longshoremen complained at the outset to hatch boss Tom Hendriksen that standing in

the well was unsafe and that someone could be maimed by a toppling roll [Rep. Tr. p. 63, lines 10-22]. The hatch boss conceded it was "hazardous" [Rep. Tr. p. 200, lines 22-25], but advised the longshoremen he would watch the rolls until they started to topple and would shout to them when to drop their lines and run [Rep. Tr. p. 219, lines 11-17]. Having no other alternative except to work as directed, the longshoremen discharged two or three rolls [Rep. Tr. p. 74, lines 14-19]. Then the hatch boss, Tom Hendriksen, left the hold, as it was near quitting time and he wanted to do some paper work ashore [Rep. Tr. p. 211, lines 2-6]. When he left there was no one to supervise the discharge job or to shout a warning when the rolls started to topple.

The longshoremen then attempted to discharge another roll in his absence. As the next roll was pulled off the shelf, it toppled into the well as intended, but struck the plaintiff as he tried to run beneath it [Rep. Tr. p. 74, lines 14-25]. Plaintiff was injured, in other words, in precisely the way he had feared [Rep. Tr. p. 118, lines 7-9]. When the stevedore superintendent, Mr. Mann, later discovered the men had been standing in the well, contrary to his intention, he declared he would have stopped them from doing this had he known about it [Rep. Tr. p. 17, lines 5-7]. Unfortunately, he did not know and had not checked to see if the longshoremen were observing proper safety practices.

At no time during the discharge operation were the ship's officers consulted about the method to be used [Rep. Tr. p. 137, line 25 through p. 138, line 2]. The method was selected solely by the stevedore company [Rep. Tr. p. 207, lines 3-7]. At no time was a ship's

officer present in the hold nor did the shipowner have knowledge the stevedore company was using this admittedly dangerous and improper method [Rep. Tr. p. 119, lines 20-24; p. 138, line 25 through p. 139, line 3].

Subsequently, at the trial, the Court gave the following instruction among others requested by plaintiff:

> "If the cargo can be discharged with reasonable safety only by conducting the discharge in a certain manner, or after observing certain precautions, and it is discharged in a different manner, or without observing such precautions, involving unreasonable risk of harm to the longshoremen, the vessel is thereby rendered unseaworthy." [Rep. Tr. p. 241, line 24, through p. 242, line 5.]

The jury thereafter retired to deliberate and later returned a verdict for the plaintiff against the shipowner, but denied the shipowner indemnity from the stevedore company.

SPECIFICATION OF ERRORS

1. The Court erred in giving the stevedore company's fifth proposed instruction, as follows:

> "If you should find that the vessel or its cargo was in such condition that the stevedore was prevented or seriously handicapped in its ability to discharge the vessel in a workmanlike manner and with reasonable safety, then the shipowner is in fact precluded from recovering from the stevedore company." [Rep. Tr. p. 259, line 24, to p. 260, line 4]

The shipowner objected at the trial to this instruction [Rep. Tr. p. 295, lines 12-16].

2. The Court erred in denying the shipowner's motion for a directed verdict against the stevedore company [Rep. Tr. p. 294, lines 6-18], and in denying the shipowner's motion for judgment notwithstanding the verdict [Rep. Tr. pp. 306-309; Cl. Tr. p. 31].

ARGUMENT OF THE CASE

I

THE COURT ERRED IN GIVING THE STEVEDORE COMPANY'S FIFTH PROPOSED INSTRUCTION THAT THE SHIPOWNER WAS PRECLUDED FROM RECOVERING INDEMNITY IF THE CARGO WAS IN SUCH CONDITION THAT THE STEVEDORE COMPANY WAS HANDICAPPED IN ITS ABILITY TO SAFELY DISCHARGE THE SHIP.

Plaintiff's accident was not caused by any dangerous condition of the cargo which seriously handicapped the stevedore company. Plaintiff's accident was caused by the inexcusable failure of the stevedore company employees to use the logical method of discharge selected by its superintendent, Mr. Mann. The giving of this instruction was error because there was no evidence on which it could be based.

The giving of the instruction was error, moreover, because the instruction clearly misstated the law. It is settled that creation of a dangerous condition by the shipowner does not preclude indemnity. In *Crumady v. Joachim Hendrik Fisser,* 358 U.S. 423, 3 L.Ed.2d 413, 79 S.Ct. 445 (1959), the shipowner negligently created an unsafe condition by setting a cut-off switch at twice

the safe working load. The stevedore company was held liable, nevertheless, because its careless handling of the boom "brought into play" the dangerous condition created by the shipowner. The shipowner's conduct in creating the condition did not preclude indemnity.

In *Waterman S. S. Corp. v. Dugan & McNamara,* 346 U.S. 421, 5 L.Ed.2d 169, 81 S.Ct. 200 (1960), the vessel permitted a stevedore company to stow bags of sugar in an unseaworthy manner. At the next port a longshoreman was injured while discharging those bags. In the shipowner's action for indemnity, against the discharging stevedore company, the Court held the stevedore company liable because it brought the unsafe condition of the stow into play. The fact that the shipowner initially permitted the bags to be stowed in an unseaworthy manner did not preclude indemnity.

In *Matson Terminals, Inc. v. Caldwell,* 354 F.2d 681 (9th Cir. 1965), where a longshoreman was injured by defective winches supplied by the shipowner, the Court granted the shipowner indemnity and stated:

> "Under the stevedoring contract, Sea-Land agreed to supply adequate winches in good working order. It failed to do so. However, Matson discovered that the winches were not in good working order immediately upon commencement of its stevedoring operations and several days prior to the occurrence which caused injury to Caldwell. At the time that Matson discovered and became aware of the malfunctioning of the winches, *it can hardly be asserted that Sea-Land's failure to supply winches in good working order constituted such a material breach of*

> *the stevedoring contract, or of such conduct on the part of Sea-Land, as to preclude it from enforcing the contract to recover indemnity.* . . . Upon discovery of the unsatisfactory condition, Matson was obligated to call such condition to the attention of Sea-Land and obtain acknowledgment thereof. Conceivably, the unsatisfactory condition of the winches would have justified Matson in discontinuing its stevedoring operations, which were hazardous, until Sea-Land had remedied the defect. *DeGioia v. United States Line Company,* 304 F.2d 421, 424 (2nd Cir. 1962); *Simpson v. Royal Rotterdam Lloyd,* 225 F.Supp. 947, 952 (S.D.N.Y. 1964)." (italics supplied)

Other opinions are quoted at length in Appendix B to this brief.

In view of the authorities discussed above, it is clear that, even if the shipowner permitted the cargo to be stowed improperly, such conduct by the shipowner does not as a matter of law preclude indemnity because the stevedore company had actual knowledge of the stow's condition and failed to stop work or notify the shipowner of the problem, and instead used a method of discharge everyone considered foolhardy and thereby injured plaintiff.

Prejudice from an erroneous instruction could not be better proved. The Stevedore Company's entire defense rested on this instruction, as is apparent in counsel's closing argument. Counsel read and emphasized this instruction to the jury no less than four times [Rep. Tr. p. 285, lines 9-16; p. 286, lines 1-5; p. 287, lines 18-25; p. 288, lines 17-23].

II

THE TRIAL COURT ERRED IN DENYING THE SHIPOWNER'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT WHERE THE STEVEDORE COMPANY DISCHARGED THE ROLLS OF NEWSPRINT IN AN ADMITTEDLY IMPROPER MANNER AND THEREBY CAUSED PLAINTIFF TO BE SERIOUSLY INJURED.

A. Motions For Directed Verdict And Judgment Notwithstanding the Verdict Should be Granted Where There Can Be But One Reasonable Conclusion As to the Proper Verdict.

In Brady v. Southern R. Co., 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943), the Supreme Court held that, where the evidence is such that without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or judgment notwithstanding the verdict.

B. The Only Reasonable Conclusion to be Drawn is That the Stevedore Company Breached its Warranty of Workmanlike Service in Failing to Safely and Properly Discharge the Rolls of Newsprint.

Uncontradicted evidence proved the stevedore company breached its warranty of workmanlike service in at least these matters:

1) It failed to stop work when it became aware of a dangerous work condition.

2) It failed to notify the shipowner of a potentially dangerous work condition.

3) It failed to remedy the dangerous condition or take any steps for the safety of the longshoremen.

4) Its superintendent, Mr. Mann, failed to tell the longshoremen they should stand on the shelf, as he intended, while breaking over the rolls.

5) Its superintendent failed to observe the operation to ascertain whether safety practices and his instructions were being followed.

6) It used a grossly unsafe method of discharge, instead of the method intended by its superintendent.

7) Its hatch boss, Mr. Hendriksen, deserted his post in the middle of a hazardous operation and was not present at the time of the accident to shout the necessary warning to plaintiff.

The stevedore company's faults were so gross that its counsel conceded the stevedore company has breached its warranty of workmanlike service [Rep. Tr. p. 281, p. 18 to p. 282, line 2]. Accordingly, the stevedore company's fault was judicially settled.

C. The Shipowner Participated in No Way in the Discharge Operation and Was Not Guilty of Any Conduct Sufficient to Preclude Indemnity.

The stevedore company was in sole and complete charge of the unloading operation. The method of discharge of the rolls was selected by the stevedore company without notice to the shipowner. Indeed, the shipowner was neither consulted nor advised about any phase of

the discharge operation. At no time relevant hereto were any of the ship's crew present.

The stevedore company contended, at the trial, that the shipowner permitted the rolls to be stowed in a manner that handicapped it and, ipso facto, the shipowner was precluded from recovering indemnity. Assuming arguendo the stevedore company correctly interpreted the authorities (which the shipowner denies) the shipowner is still entitled to a directed verdict or judgment notwithstanding the verdict. This is because the uncontradicted evidence proved the stevedore company had full and complete knowledge of the stowage prior to the accident and willingly elected, without consulting or advising the shipowner, to proceed with the discharge in a dangerous and improper manner. In so doing, the stevedore company waived any possible breach of duty by the shipowner. As District Judge Mathes held in *Hugev v. Dampskisaktieselskabet International,* 170 F. Supp. 601, 611 (S.D.Cal. 1959):

> "Furthermore, if it were assumed arguendo that the misplaced 'queen beam' was a breach by the shipowner, the stevedoring contractor was fully aware of this latent condition prior to plaintiff's injury and nonetheless willingly proceeded with the work despite the known dangerous condition, and hence would be held to have waived the condition. Restatement, Contracts, 297, 294 (1932); See *American President Lines v. Marine Terminals Corp.,* supra, 234 F. 2d at page 759; CF. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.,* supra, 350 U.S. at pages 134-135, 76 S. Ct. at pages 237-238."

See also *Metropolitan Stevedore Company v. Dampskisaktieselskabet International,* 274 F. 2d 875, 876-7 (9th Cir. 1960), cert. den. 363 U.S. 803, 4 L.Ed.2d 1147, 80 S. Ct. 1237; and *Weigel v. The M/V BELGRANO,* 188 F. Supp. 605, 610-11 (D.C. Ore. 1960).

Moreover, there was no evidence the shipowner prevented or seriously handicapped the stevedore company from performing in a workmanlike manner. The stevedore company is obliged by its warranty to stop work whenever it encounters an unsafe condition. See *Matson Terminals, Inc. v. Caldwell,* supra; *American President Lines, Ltd. v. Marine Terminals Corp.,* 234 F.2d 753 (9th Cir. 1956), cert. den. 352 U.S. 926, 1 L.Ed.2d 161, 77 S.Ct. 222; *Nicroli v. Den Norske Afrika,* 332 F.2d 651 (2nd Cir. 1964). The shipowner did nothing to prevent or handicap the stevedore company in performing its duty to stop work or, thereby, to perform in a workmanlike manner.

III

CONCLUSION

As between the shipowner and the stevedore company, the party in the best position to prevent the longshoreman's accident will be made to bear the financial burden of his injuries. See *Italia Societa v. Oregon Stevedoring Co.,* 376 U.S. 315, 11 L.Ed.2d 732, 84 S.Ct. 748 (1964).

Stevedore companies represent themselves to be expert and experienced in the work of unloading cargo. They know cargo has been loaded by stevedores of varying degrees of competency around the world and that there

may be unsafe conditions related to discharging the cargo. The stevedore company holds itself out as being trained and equipped to cope with these conditions and dangers. To this end, the stevedoring company is given full use and charge of the ship's unloading equipment and the cargo hatches and holds. If any condition is found which is unsafe for longshoremen, the stevedore company may remedy it at the expense of the shipowner and, if stevedoring operations are thereby delayed, the shipowner normally must pay for standby time. *Hugev v. Dampskisaktieselskabet International,* supra.

This expert stevedore proceeded, in violation of its superintendent's intentions, to use a method everyone instantly recognized as highly hazardous and, in so doing, caused plaintiff's injuries. If the stevedore company had only stopped work, as it should have done, or if it had used a safe method of discharge, as it should have done, plaintiff would not have been injured.

Safety in the longshore industry will be encouraged only if the stevedore company willingly bears the burden of proceeding in the face of obvious danger. *Pacific Far East Line v. California Stevedore & Ballast Co.,* 238 F. Supp. 956 at 959 (N.D.Cal. 1965). (See Appendix B, p. iv.)

In view of the uncontradicted evidence of the stevedore company's gross fault, the shipowner was entitled to a directed verdict and judgment nil obstunse verdicto. The shipowner would be entitled to a new trial under proper instructions if there was any doubt as to the proper verdict but where, as here, the evidence and applicable law proves the stevedore company breached its

warranty and the shipowner was not guilty of conduct sufficient to preclude indemnity, the judgment of the trial court should be reversed and judgment entered for the shipowner.

Respectfully submitted,

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APPENDIX A

Table of Plaintiff's and Defendant's Exhibits

Plaintiff's Exhibits		Identified	Offered	Rec'd./Rej.
#1	Diagram of "cat sole"	p. 59	p. 270	Rec'd p. 270
#2	Diagram of #5 deep tank	p. 76	p. 270	Rec'd p. 270
#5	Earnings record	p. 132	p. 132	Rec'd p. 132
#6	Recent earnings record	p. 132	p. 132	Rec'd p. 132
#7	Wage increases	p. 133	p. 133	Rec'd p. 133
#8	Medical records	p. 226	p. 227	Rec'd p. 227
Defendant's Exhibits				
A	Diagram of ship	p. 106	p. 270	Rec'd p. 270
B	Cargo plan	p. 203-4	p. 270	Rec'd p. 270
C	Hatch log	p. 110, p. 140-1	p. 110	Rec'd p. 111
D	Diagram	p. 144	p. 154	Rec'd p. 154
E	Diagram	p. 154-7	p. 157	Rec'd p. 157

APPENDIX B

In *Simpson v. Royal Rotterdam Lloyd,* 225 F.Supp. 947, 951-3 (S.D.N.Y. 1964), the shipowner permitted a cargo of tin ingots, improperly coated with grease, to be loaded. The discharging stevedore company knew the ingots were dangerous but proceeded with the work until one of its employees was injured. In allowing the shipowner to recover indemnity, the Court stated:

> "I conclude that Stevedore in this case breached its obligation to Shipowner to perform its services in a workmanlike manner . . . once a stevedore has knowledge of an unsafe condition, there is an obligation upon the stevedore to either remedy the condition or to cause the ship to do so. *Tedeschi v. Luckenbach S.S. Co.,* 324 F.2d 628, 2 Cir., 1963; *Caputo v. United States Lines Co.,* 311 F.2d 413, 415 (2 Cir.), cert. denied, *Imparato Stevedoring Corp. v. United States Lines Co.,* 374 U.S. 833, 83 S.Ct. 1871, 10 L.Ed.2d 1055 (1963); *Drago v. A/S Inger,* supra; *DeGioia v. United States Lines Co.,* 304 F.2d 421, 424 (2 Cir. 1962); *Misurella v. Isthmian Lines, Inc.,* 214 F.Supp. 857, 863 (S.D.N.Y. 1963), appeal docketed, No. 28350, 2 Cir., July 12, 1963; *Nicroli v. Den Norske Afrika-OG Australielinie Wilhelmsens Dampskibs-Aktieselskab,* 210 F.Supp. 93, 97 (S.D.N.Y. 1962). This obligation of a stevedore includes ordinarily the duty not to continue work until a known dangerous condition has been made reasonably safe. *Caputo v. United States Lines Co.,* supra; *United States v. Arrow Stevedoring Co.,* 175 F.2d 329, 331 (9 Cir.), cert. denied, 338 U.S. 904, 70 S.Ct. 307, 94 L.Ed. 557 (1949); *Misurella Compania Anonima Vene-*

zolana De Navegacion, 1962 A.M.C. 1347, 1351 (S.D.N.Y.); *Nicroli v. Den Norske Afrika-OG Australielinie Wilhelmsens Dampskibs-Aktieselskab,* supra; *Hugev v. Dampskisaktieselskabet Int'l.,* 170 F.Supp. 601, 608 (S.D.Cal. 1959), aff'd. sub nom., *Metropolitan Stevedore Co. v. Dampskisaktieselskabet Int'l.,* 274 F.2d 875 (9 Cir.), cert. denied, 363 U.S. 803, 80 S.Ct. 1237, 4 L.Ed.2d 1147 (1960); *Revel v. American Export Lines, Inc.,* 162 F. Supp. 279, (E.D.Va. 1958), aff'd. 266 F.2d 82 (4 Cir. 1959).

"Tin ingots covered with grease constitute a danger to the longshoremen who are to unload them. Stevedore, through its hatch boss, had actual knowledge of the dangerous condition. Stevedore breached its obligation to perform a workmanlike job by continuing to unload the cargo in the condition it was in. Merely showing the unsafe condition to the ship's officer was not sufficient to discharge the obligation of the Stevedore, unless the condition was remedied. Wiping the tops of the ingots with rags already greasy and cautionary words by the hatch boss to the men to be careful and by the men to each other do not discharge the obligation of the stevedore to the Shipowner."

In *Nordeutscher Lloyd, Brennan v. Brady-Hamilton Steve. Co.,* 195 F.Supp. 680 (D.C. Ore. 1961), the shipowner had permitted heavy crates of glass to be stowed improperly, and a longshoreman was injured during the difficult discharge. In allowing the shipowner to recover indemnity, from the discharging stevedoring company, the Court said:

"The respondent's duty under its contract with the libelant included the duty to suspend the loading or unloading operation of its own initiative and thus avoid injury or damage whenever it realized that it would be unsafe to proceed. *United States v. Arrow Stevedoring Co.,* 9 Cir. 1949, 175 F.2d 329, certiorari denied 338 U.S. 904, 70 S.Ct. 307, 94 L.Ed. 557. The warranty of seaworthiness raised in favor of the shipper of cargo and extended to seamen and longshoremen, *Seas Shipping Co. v. Sieracki,* 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, does not extend to the stevedoring contractor. *Crumady v. The JOACHIM HENDRIK FISSER,* 1959, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413. It is said that such a contractor represents himself to be, and is assumed to be, expert and experienced in the work of loading and unloading cargo, while the individual longshoreman may or may not be so qualified. *Hugev v. Dampskisaktieselskabet,* D.C.S.D. Cal. 1959, 170 F.Supp. 601.

"There is a definite duty on the part of the stevedore to call to the attention of the ship's officers all unseaworthy conditions and to stop all operations when it appears that to proceed would be unsafe. *Revel v. American Export Lines,* E.D.Va. 1958, 162 F.Supp. 279, 281, affirmed *American Export Lines v. Revel,* 4 Cir., 266 F.2d 82; *United States v. Arrow Stevedoring Co.,* supra."

"The evidence is clear that the stowage of the crates of glass on the bundles of pipe was improper, that respondent had notice of the dangerous place in

which Ough and his fellow workmen were compelled to work and that nothing worthwhile was done to protect the men from the hazards of unloading this dangerous cargo.

"Mowrey, respondent's hatch boss, testified this was one of the worst stows of glass he had ever seen. It was so bad he reported it to the walking boss, the head employee of respondent, and told him that the stowage was an awful mess. The walking boss agreed and told the hatch boss to do what he could with it.

"On an examination of all of the evidence in this case, observed in light of the foregoing authorities, I find substantial evidence that respondent breached its stevedoring contract with libelant in failing to discharge said cargo in a safe and proper manner and in negligently performing such contract in each of the particulars as charged by libelant.

"I further find that the discharge of the cargo and the manner in which the discharge was handled were entirely within the control of respondents. There is no evidence that the libelant breached or failed to perform any duty which it owes to respondent."

(underlining supplied)

In *Pacific Far East Line v. California Stevedore & Ballast Co.*, 238 F.Supp. 956 (N.D.Cal. 1965), at page 959 the Court said:

"The possibility of indemnity over against it by the shipowner will cause a stevedore company to hesitate before risking its crew in an unsafe, unsea-

worthy condition — as it might do if it could do so with impunity. Presumably a shipowner, even one whose ship in some respects subjects it to an absolute liability for unseaworthiness, would prefer that work be stopped rather than the condition be "brought into play" by the stevedore company to the injury of a worker. The stevedore company's warranty of proper workmanship is broad enough to imply that it will not proceed in the face of a known, dangerous condition. Its clear obligation is to either remedy the condition, or have the ship remedy it, or, if necessary, refuse to subject workers to the risk of injury — an obligation analogous to the obligation to exercise the "last clear chance" as recognized by the law of torts."

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 & 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Francis J. MacLaughlin